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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH CHARLES POUNDS,

Defendant and Appellant.

F072741

(Super. Ct. Nos. RF007197A,
RF007226A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Kenneth G. Pritchard, Judge.

Stephen M. Hinkle, under appointment by the Court of Appeal, Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Barton Bowers, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Peña, J. and McCabe, J.†

† Judge of the Superior Court of Merced County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Defendant Joseph Charles Pounds contends on appeal that his prison sentence for the purchase, use, or possession of tear gas under Penal Code section 22810, subdivision (a)¹ was an unauthorized sentence because the evidence showed that his offense was mere possession, a misdemeanor punishable only by jail time under section 22900. The People concede. The parties agree, as do we, that the sentence must be vacated and the matter remanded for resentencing.

BACKGROUND

The complaint alleged as to the tear gas charge that on January 21, 2015, defendant “did willfully and unlawfully purchase, possess or use tear gas or a tear gas weapon having previously been convicted of a felony or any crime involving an assault, to wit: violation of PC 422 on or about May 1, 2006 ... in violation of ... section 22810(a), a felony.” (Unnecessary capitalization omitted.)

The plea form, signed by defendant on March 17, 2015, noted the tear gas charge as “PC 22810(A)” with a minimum sentence of 16 months and a maximum sentence of three years. The box for state prison was marked and the box for county jail was left blank. The form noted the trial court was required to find a factual basis for the plea and the court could consider the police report.

On March 17, 2015, defendant pled to two counts of vandalism (§ 594, subd. (b)(1); one from another case) and one count of purchase, use, or possession of tear gas (§ 22810, subd. (a)). He admitted suffering a prior serious felony conviction for criminal threat (§§ 422, 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).

The probation officer’s report, prepared on April 8, 2015, included a police summary of the facts of the offense, which stated that on January 21, 2015, defendant broke down the front door of his ex-girlfriend’s residence. The next day, “officers ... located the defendant and arrested him. During a search of the defendant, officers located

¹ All statutory references are to the Penal Code.

pepper spray in the defendant's pocket. The defendant denied kicking in the victim's door and he was subsequently transported to the Kern County Jail where he was booked for related charges."

On October 1, 2015, the trial court sentenced defendant to six years in prison on one vandalism count, 16 months on the second vandalism count, and 16 months on the tear gas count. Both 16-month terms were to be served consecutively to the six-year term.

On November 9, 2015, defendant filed a notice of appeal.

DISCUSSION

Section 22810, subdivision (a) provides that "[n]o person convicted of a felony ... may purchase, possess, or use tear gas or any tear gas weapon," but that provision does not specify the punishment for its violation. Subdivision (g) of the same section provides that *use* of tear gas or a tear gas weapon except in self-defense is punishable "by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months, or two or three years or in a county jail not to exceed one year or by a fine not to exceed one thousand dollars (\$1,000), or by both the fine and imprisonment." (§ 22810, subd. (g).) As for unlawful *possession* of tear gas or a tear gas weapon, section 22810 does not address punishment. Rather, section 22900 provides that unlawful *possession* is punishable only "by imprisonment in the county jail for not exceeding one year or by a fine not to exceed two thousand dollars (\$2,000), or by both that fine and imprisonment."

Here, the evidence showed only possession, not use. Accordingly, it was error for the trial court to sentence defendant to prison for this offense. Defendant's conviction for being a felon in possession of tear gas requires resentencing.

DISPOSITION

In case No. RF007197A, the sentence for possession of tear gas by a felon (§ 22810, subd. (a); count 2) is vacated and the matter remanded for resentencing. The judgment is affirmed in all other respects.